

Chapter 1 – Purpose and Need

On February 5, 2003; the Three Affiliated Tribes (Mandan, Hidatsa, Arikara Nation [MHA Nation]) voted to purchase three tracts of land on the Fort Berthold Indian Reservation in North Dakota. These tracts, which are in the northeast corner of the Reservation and in Ward County (Figure 1-1) include: the NW ¼ of Section 20, Township 152 North, Range 87 West (Tract 1);

- the North ½ of Section 19, Township 152 North, Range 87 West (Tract 2); and
- Outlot 1 in the NE ¼ of Section 19, Township 152 North, Range 87 West (Tract 3).

Taken together as a single parcel, these tracts encompass almost 469 acres. Following the purchase, the MHA Nation requested that the Department of the Interior, Bureau of Indian Affairs (BIA) accept the tracts into trust status. The Indian Reorganization Act of 1935 (IRA) authorizes the Secretary of the Interior to hold land for Indian Tribes and individual Indians in trust (Resolution 03-020 dated March 17, 2003).

The MHA Nation proposes to construct, operate, and maintain a clean fuels refinery on 190 acres of the 469-acre parcel. The MHA Nation would own the refinery. The MHA Nation would grow hay on the other 279 acres. This would reduce the costs of purchasing hay for buffalo from other sources.

Purpose and Need for the Proposed Action

The purpose to which the federal agencies are responding is the MHA Nation's proposal that BIA accept 469 acres of fee land into trust for the purposes of constructing and operating a clean fuels petroleum refinery and producing buffalo forage on the Fort Berthold Indian Reservation. The need is to facilitate Tribal self-determination and economic development. The BIA, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) each have federal agency decisions to make based upon this Environmental Impact Statement. BIA will decide whether to approve the Tribes' request that BIA accept the 469 acres of land into trust for the purposes of constructing and operating the clean fuels refinery and for producing buffalo forage. EPA will decide whether to approve the Tribes' application for a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit for process water discharges associated with operation of the proposed refinery. USACE will decide whether to issue a Clean Water Act Section 404 permit for the discharge of dredge and fill materials into waters of the United States (U.S.), associated with the construction of the proposed refinery.

NEPA Process and Decision Making

As a general matter, Federal agencies, such as BIA and EPA, must comply with the National Environmental Policy Act (NEPA) before approving any major federal actions that may have a significant effect on the human environment. BIA's decision on the MHA Nation's request that BIA accept the lands into trust for purposes of the proposed project

and EPA's issuance of a new source NPDES permit constitute such major federal actions. BIA is the federal agency with the primary responsibility for administering trust lands and, as such, it must ensure the NEPA process is conducted for MHA Nation's request to accept the tracts into trust status.

As the initial lead federal agency for conducting the NEPA analysis, BIA could invite others to participate in the NEPA process. After reviewing the MHA Nation's proposal, jurisdictional concerns, and potential effects, BIA invited the EPA, U.S. Fish and Wildlife Service (FWS), Indian Health Services (IHS), USACE and the MHA Nation to participate in the NEPA analysis.

EPA initially decided to participate as a cooperating agency because of its authority for permitting specific aspects of the clean fuels refinery project. As the process moved forward, BIA asked EPA to reconsider and become a joint lead. EPA directly implements its federal environmental protection programs on the Fort Berthold Indian Reservation. Under the Clean Water Act (CWA), EPA has the authority to issue an NPDES permit to the facility for the process water discharges from the operation of the refinery. The MHA Nation has submitted an NPDES permit application to EPA for the process water discharges. EPA's issuance of the NPDES surface discharge permit to this facility is a "major federal action significantly affecting the quality of the human environment." Since EPA has determined the facility is a "new source" under the CWA, EPA's issuance of the NPDES permit for a new source discharging process water invokes NEPA. In addition to the NPDES process water permit, EPA also has the authority to issue any applicable stormwater permits to the facility for stormwater construction and operation discharges into waters of the United States (U.S.). Under the Clean Air Act (CAA), EPA is responsible for permitting major sources of air pollution. However, at this time EPA has determined that the facility does not require a Clean Air Act Prevention of Significant Deterioration (PSD) permit for construction of a new major source of air pollution or a Clean Air Act Part 71 permit to regulate air emissions while the refinery is operating. EPA has determined EPA's Underground Injection Control (UIC) program will apply to the refinery and an UIC permit will be needed if the refinery uses a septic system and leach field. Depending upon how waste water will be discharged from the facility, the refinery may need a Class I UIC permit. Depending on whether the facility meets the definition of a public water system, the refinery may be regulated by EPA under the Safe Drinking Water Act. Depending on whether the facility uses underground storage tanks subject to the Underground Storage Tank (UST) requirements, the refinery may be regulated by EPA under the UST requirements. Depending on how hazardous wastes will be handled and stored at the proposed facility, the refinery may need a Resource Conservation and Recovery Act (RCRA) hazardous waste permit from EPA. The potential hazardous waste permit and the UIC permits do not invoke NEPA for EPA; however, information about the permits will be included in the Environmental Impact Statement (EIS).

BIA asked the MHA Nation to participate as a cooperating sovereign nation because of its local expertise and unique status. The MHA Nation has specific expertise in several areas that are important to the NEPA analysis, including cultural resources and socio-economics. Additionally, the MHA Nation is a sovereign nation with which BIA and EPA have a federal trust relationship.

Figure 1-1 Project Site Location

BIA asked the FWS to participate as a cooperating agency. The FWS declined to participate as a cooperating agency. Although FWS will not participate as a cooperating agency, it did agree to provide information and data where it could and review documents. BIA and EPA will determine whether the actions they authorize, fund or carry out in connection with this project may affect federally listed threatened or endangered species or the designated critical habitat of such species. If BIA or EPA determines that its actions may affect such species or critical habitat, it will consult with the FWS as appropriate under the ESA.

In response to the comments submitted in response to the October 1, 2004 draft version of this report, BIA asked IHS to participate in the NEPA process as a cooperating agency. IHS declined to participate as a cooperating agency. Although IHS will not participate as a cooperating agency, it did agree to provide information and data where it could and review documents.

BIA asked the USACE to participate as a cooperating agency because of its authority under the CWA for permitting the discharge of dredged or fill material into all waters of the U.S., including wetlands. USACE has determined a wetlands swale and wetlands on the northwestern boundary of the project site are waters of the U. S. subject to USACE regulatory authority under CWA Section 404. The proposed project may include dredge and fill of the wetlands swale. With this determination, the MHA Nation would have to obtain a 404 permit from USACE before any dredging and filling of the wetlands swale could occur. No dredge or fill activities are proposed for the wetlands located on the northwestern boundary of the project area.

BIA, EPA, USACE, and the MHA Nation entered into an agreement (Memorandum of Understanding [MOU]) to facilitate completion of the NEPA process and preparation of the EIS. This MOU defines each party's roles and responsibilities for preparing documents, reviewing documents, and coordinating decision making with regard to the EIS. Ultimately, both BIA and EPA intend to make decisions about the MHA Nation's proposal using the results of the NEPA analysis.

This document provides BIA and EPA with information upon which to base final decisions that consider factors relevant to the proposal. Scoping issues and concerns raised by the public and agencies drove the development of alternatives and the focus of the environmental impact analysis. This EIS documents (1) the analysis of effects on human health and the environment that could result from implementation of the proposed action or alternatives to that action and (2) the development of environmental protection measures needed to reduce or eliminate environmental consequences.

Finally, this EIS is not a decision document. It discloses the process used to analyze the potential environmental consequences of implementing the proposal and alternatives to the proposed action. BIA's decision about the proposed project will be contained in a Record of Decision (ROD). EPA will consider this NEPA analysis in a separate ROD and NPDES permitting action.

Decisions to be Made Based on this NEPA Analysis

As noted above, BIA, EPA, and USACE will make separate decisions based on this NEPA analysis. BIA's decision will be documented in a ROD signed by the Great Plains

Regional Director. The ROD will indicate any mitigation measures that need to be adopted. The Superintendent of the BIA Fort Berthold Agency will consider the ROD when deciding whether to accept the 469 acres into trust status for the MHA Nation. In addition to the ROD, the Superintendent must consider the existence of statutory authority, need for the additional land, purpose for the land, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls, jurisdictional problems and potential conflicts of land use that may arise, and whether BIA is equipped to discharge the additional responsibilities resulting from acquisition of the land in trust status (25 Code of Federal Regulations [CFR] part 151.10). This decision will have appeal rights as mandated in 25 CFR Part 2.

EPA's decision whether to issue the NPDES process water permit for the refinery will be documented in a ROD signed by EPA Region 8's Regional Administrator. EPA will issue any applicable permits for storm water and UIC and may issue a permit for RCRA hazardous waste. Permits typically delineate the maximum allowable emissions or discharges of pollution from the regulated facility, monitoring, recordkeeping, reporting, and pollution control/mitigation requirements. 40 CFR 124.19 sets forth the permit appeal process for NPDES, RCRA and UIC permits.

The USACE will use this EIS in determining whether to issue any necessary CWA Section 404 permits for the discharge of dredged or fill material into waters of the U.S., including wetlands. The USACE will issue any such permits only after compliance with the USACE regulations (33 CFR 320 et seq.) and the CWA 404(b)(1) Guidelines (40 C.F.R. 230, et seq.). 33 CFR 331 sets forth the CWA Section 404 permit appeal process.

On June 19, 2006, the Supreme Court announced its decision in *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, ___ S.Ct. ___, 2006 WL 1667087, regarding the jurisdiction of the Clean Water Act. The federal agencies are currently considering what effect, if any, the decision may have on the Clean Water Act permitting requirements for the proposed refinery. The final Environmental Impact Statement will reflect the outcome of these deliberations.

Authorizing Actions

A variety of permitting actions would be required to implement any of the action alternatives. Table 1–1 lists the major permits, approvals, and consultations that may be required for the acceptance of land into trust in support of the proposed refinery or which may be required at some time in the future. The list is subject to change, depending on requirements for any alternative selected by the decision makers.

Table 1–1 Major Permits, Approvals, and Consultations Potentially Required for the Clean Fuels Refinery Project

Issuing Agency/Permit Approval Name	Nature of Regulatory Action	Applicable Project Component
<i>Federal Permits, Approvals, and Authorizing Actions</i>		
<i>U.S. Bureau of Indian Affairs</i>		
Indian Reorganization Act of 1935.	Authorizes the Secretary of the Interior to hold land for Indian Tribes and individual Indians in trust.	The 469-acre parcel in Sections 19 and 20 of Township 52 North, Range 87 West.
<i>U.S. Environmental Protection Agency</i>		
Clean Air Act – New Source Review Preconstruction Air Permit.	Controls emissions from new or modified sources.	Sources of air emissions (excluding air toxic pollutants listed under section 112) that emit 100 tons/year or more, if the source belongs to a list of 28 specific categories, or any other source type which emits 250 tons/year or more.
Clean Air Act – Title V Operating Permit.	CAA requires all major sources of air emissions to obtain a permit that applies to day-to-day operation of the facility.	Sources of air emissions that emit 100 tons/year or more of a criteria pollutant or 10 tons/year of a hazardous air pollutant or more than 25 tons/year of any combination of hazardous pollutants.
Clean Water Act – National Pollutant Discharge Elimination System – Permit for Point Source Discharges – Process Water.	Authorizes point source discharges of pollutants to waters of the U.S. in accordance with effluent guidelines, water quality standards, monitoring requirements, and other conditions as set by EPA.	Facilities with proposed process water discharges associated with an industrial activity.
Clean Water Act – 401 Certifications for Section 402 NPDES process water permit and Section 404 permit.	State or Federal certification that Federal licensing or permitting activity complies with Clean Water Act requirements.	All CWA 404 (Dredge and Fill) and 402 (NPDES) permits require 401 Certification prior to issuance of the permit.
Clean Water Act – National Pollutant Discharge Elimination System – Construction General Permit.	Authorizes discharge of storm water pollutants associated with construction.	Construction activities that disturb 5 or more acres of land.
Clean Water Act – National Pollutant Discharge Elimination System – Multi-Sector General Permit.	Authorizes discharges of an industrial activity to waters of the U.S. in accordance with effluent limitations, monitoring requirements, and other conditions as set by EPA.	New facilities with proposed water discharges associated with an industrial activity.
Clean Water Act – Oil Pollution Act - Facility Response Plan	The Oil Pollution Act requires certain facilities that store and use oil to prepare FRPs and submit them to EPA in order to ensure adequate response mechanisms are in place to respond to worst case oil spills.	Storage and use of oil requires preparation of FRPs for certain facilities prior to operation to provide measures to respond to oil spills that could reach navigable waters.
Clean Water Act – Oil Pollution Act – Spill Prevention Control Countermeasure Plan	The Oil Pollution Act requires certain facilities that store and use oil to prepare SPCC plans and retain them at the facilities to ensure facilities put in containment and other measures to avoid oil spills that could reach navigable waters.	Storage and use of oil requires preparation of SPCC plans prior to operation to provide measures to avoid oil spills that could reach navigable waters.
Safe Drinking Water Act – Public Water Supply System Program.	National health-based standards for drinking water to protect against both naturally occurring and man-made contaminants.	Public water system.

Table 1–1 Major Permits, Approvals, and Consultations Potentially Required for the Clean Fuels Refinery Project

Issuing Agency/Permit Approval Name	Nature of Regulatory Action	Applicable Project Component
Safe Drinking Water Act – UIC Permit for Septic System.	Authorizes discharges of sanitary wastes into or above shallow ground water from a system that has the capacity to serve 20 or more people per day.	Septic system and leach field.
Safe Drinking Water Act – UIC Permit for Injection (Alt. C).	Authorizes use of Class I injection well for disposal of hazardous or non-hazardous industrial waste below the lowermost underground source of drinking water, under 40 CFR Part 146 Subpart G.	Underground injection of industrial waste.
Resource Conservation and Recovery Act – Treatment, Storage, and Disposal (TSD) Permit.	Design, monitoring, and closure requirements for TSD units.	Applies if the facility stores hazardous waste more than 90 days, treats hazardous waste, or has disposal facilities for hazardous waste.
Resource Conservation and Recovery Act – Hazardous Waste Generator.	Regulations for storing, treating, and disposing of hazardous waste.	RCRA listed and characteristic hazardous waste.
Resource Conservation and Recovery Act – Solid Waste Management.	The facility must comply with federal regulations at 40 CFR 257 “Criteria for Classification of Solid Waste Disposal Facilities and Practices.”	Land disposal of non-hazardous solid waste from the facility.
Resource Conservation and Recovery Act – Subtitle I – Underground Storage Tanks (UST).	Technical standards and corrective action requirements for owners and operators of underground storage tanks	Underground storage tanks.
<i>U.S. Fish and Wildlife Service</i> Endangered Species Act compliance (Section 7).	Protects federally listed threatened or endangered species and their designated critical habitats.	Any project activity that potentially affects species listed as or proposed for listing as threatened or endangered, and/or their designated critical habitats.
Migratory Bird Treaty Act.	Protects migratory birds.	All federally funded, permitted, or authorized activities.
Bald Eagle Protection Act.	Protects bald and golden eagles.	All federally funded, permitted, or authorized activities.
<i>Advisory Council on Historic Preservation</i> National Historic Preservation Act – Cultural Resource Compliance (Section 106).	Protects cultural and historic resources. Coordinated with the Tribal Preservation Office and North Dakota State Historic Preservation Officer (SHPO).	Any federal undertakings with potential to affect cultural resources.
<i>U.S. Department of Defense, Army Corps of Engineers</i> Permit to Discharge Dredged or Fill Material (Section 404 Permit).	Authorizes discharge of dredged or fill material in waters of the U.S., including jurisdictional wetlands.	Activities involving discharge of dredged or fill materials into waters of the U.S.
<i>U.S. Department of Transportation</i> Construction and operation of natural gas pipelines.	Prescribes minimum safety requirements for pipeline facilities and the transportation of gas, including pipeline facilities.	New natural gas pipeline construction.

